a

WOON KWOK CHENG

v.

HR HOCHSTADT & ORS

b

HIGH COURT MALAYA, KUALA LUMPUR
JAMES FOONG J
[ORIGINATING SUMMONS NO: S5-24-23-1997]
12 MAY 1997

c ***ADMINISTRATIVE LAW:*** *Exercise of judicial function - Judicial review - Whether Court has jurisdiction to review rejection of application by domestic tribunal*

ADMINISTRATIVE LAW: *Rules of natural justice - Rejection of application without disclosing grounds - Whether a breach of natural justice*

d This was an application by the plaintiff for judical review of the Malayan Racing Association's ('MRA') rejection of the plaintiff's application for a jockey licence.

The plaintiff was disqualified as a jockey in 1990 for five years. In January
e 1996 the plaintiff applied for a jockey licence from MRA and the licensing and disciplinary sub-committee of MRA ('Committee') rejected the application without disclosing any grounds. The plaintiff appealed to the Committee and in January 1997, MRA agreed to reconsider the appeal but the plaintiff had to show cause why the jockey licence should be reinstated. The Committee dismissed the appeal in the absence of the plaintiff and the plaintiff filed an
f application to the court for judicial review on the grounds of breach of procedural fairness and natural justice praying for: (a) a declaration that the decision of the Committee was null and void; (b) that the respondents do issue a jockey licence to the plaintiff; and (c) costs to the plaintiff.

g The respondents objected claiming that the Court had no jurisdiction to grant judicial review of the decision which was from a domestic tribunal.

Held:

[1] Where no contractual relationship can be established between the parties
h and where the livelihood of the plaintiff is affected, the application for judical review is permitted.

i

[2] The respondents were advised to reconsider the plaintiff's application and if rejected, to give reasons for the rejection.

[3] The request that the plaintiff be issued a jockey licence was refused.

[Order accordingly.]

Cases referred to:
R v. Criminal Injuries Compensation Board, ex p Lain [1967] 2 All ER 770 ***(refd)***
Nagle v. Feilden [1966] 1 All ER 689 ***(foll)***
R v. Jockey Club, ex p Aga Khan [1993] 2 All ER 853 ***(refd)***
Law v. National Greyhound Racing Club Ltd [1983] 3 All ER 300 ***(refd)***
R v. Jockey Club, ex p Massingberd [1993] 2 All ER 207 ***(refd)***
Rohana Ariffin & Anor v. Universiti Sains Malaysia [1989] 1 MLJ ***(refd)***
Hong Leong Equipment Sdn Bhd v. Liew Fook Chuan [1997] 1 CLJ 665 ***(foll)***
Breen v. AEU [1971] 1 All ER 1148 ***(refd)***

For the plaintiff - Shahabudin; M/s Marbeck, Collin Goonting & Shahabudin
For the defendant - WH Tang; M/s Arifin & Partners

JUDGMENT

James Foong J:

Factual Background

The plaintiff was a professional jockey who had a jockey licence granted by the Malayan Racing Association (MRA). On 29 July 1990 he rode the horse 'Joy of the Jungle' in race 3 of the 4th day of the Penang July Race Meeting. At an enquiry held on 6 September 1990 before the racing stewards, he was found guilty of not running the said horse on its merits, and was duly disqualified from riding as a jockey for a period of five years effective from 6 September 1990. Dissatisfied with the decision, he appealed to the Committee of MRA ('the Committee') – but his appeal was dismissed. Court actions for judicial review were then instituted by him culminating to the Supreme Court dismissing his appeal with costs.

Five years have since lapsed, and on 15 January 1996 the plaintiff applied to the MRA for a jockey licence, stating that he had fully served his time which ended on 8 January 1996. On 26 January 1996 the MRA – Licensing and Disciplinary Sub-Committee (L&D Committee) after considering his application rejected it, and this was endorsed by the committee. This decision was conveyed to the plaintiff on 27 February 1996 without disclosing any grounds for their rejection.

Undeterred, the plaintiff appealed to the committee to reconsider their decision. This was responded to by MRA replying to the plaintiff on 13 January 1997 of: their agreement to reconsider the plaintiff's application, but required the plaintiff to attend before a special committee of the MRA on a specific date "to show cause why your (the plaintiff's) licence should be reinstated". Offended by such remarks and request, the plaintiff replied that he will not attend such "show cause" enquiry as it will "be futile". In the absence of the plaintiff, the committee met on 1 February 1997 and dismissed the plaintiff's appeal. By this time, the plaintiff had filed before this Court by way of Originating Summons for a judicial review praying: (a) a declaration that the decision of the L&D committee dated 26 January 1996, and the endorsement of this decision by the committee on 27 February 1996 in rejecting the plaintiff's application for a jockey licence are wrong in law and therefore null and void; (b) that the respondents, being committee members and secretaries respectively of the MRA do within a period of 14 days from date of order issue a jockey licence to the plaintiff upon the plaintiff paying the appropriate registration fee for such licence; (c) and costs.

The Issues

The main contention of the plaintiff is that there was no procedural fairness practised by the respondents when they failed to give reasons for their decisions – this tantamounts to an abuse of natural justice – entitling the plaintiff to the reliefs sought. The respondents while denying this and claiming their rights to non-disclosure of reasons for their decision, brought forth their objection to this Court's jurisdiction to grant judicial review of the decisions of the L&D committee and the committee, which they said, are from domestic tribunals.

The Right To Judicial Review

For the sake of good order, it is appropriate for this Court to deal with the issue of jurisdiction before embarking on the question of procedural fairness.

It has long been considered in the field of administrative law that private or domestic tribunals are outside the scope of judicial review, which are mainly reserved for acts, decisions, determinations, orders and omissions of public bodies or those performing public functions – see Lord Parker's CJ observation in *R v. Criminal Injuries Compensation Board, ex parte Lain* [1967] 2 All ER 770 at p. 778. The rationale for this reluctance in expanding the sphere to private or domestic tribunals is based on the claim that these tribunals' authority is derived solely from contract – that is from the agreement of the parties concerned. Such being the case, remedies under private law should be sufficient without resorting to a judicial review.

But what happens if the body in question is exercising a public law function, or if the exercise of its function have public law consequence, yet it is a private body: are their decisions subject to judicial review?

The MRA is a private member's club with its own constitution, rules and regulations. Like the Jockey Club of Great Britain, its origins up to the present day are not dependent or derived from any legislature. Yet it is common knowledge, of which this Court can take judicial notice, that the MRA by conducting and regulating the sport of horse racing in this country affects the lives of a sizable portion of the population. They either punt or place bets at the MRA's acknowledged premises or 'outside' it, train horses for the jockeys to ride on, or keep these fine animals to run in each race. From such occupations the government derive substantial revenue in the form of taxes. Though often disguised within the category of a sporting activity, like tennis or swimming – horse racing to a substantial extent – is gambling. And being of wager in nature the social fabric of the community is affected, particularly when it is opened to the public to lay bets on horse run or numbers drawn by the MRA. Except for certain governmental regulations, the conduct of this enterprise is largely in the hands of the MRA. They monopolise this trade which is significant to the public, and some say that they have even taken on the character of an industry. By such acts, one has little doubt that the MRA does exercise a public law function or the exercise of its function has public law consequences. Under these circumstances: do the decisions of the MRA fall within the confines of public law or private law?

The Court of Appeal in Great Britain in the case of *Nagle v. Feilden* [1966] 1 All ER 689 had the opportunity to encounter this question. The facts were these: the stewards of the Jockey Club had refused to grant a horse trainer licence to the applicant – who was a woman. The consequence was that without such a licence, horses trained by her could not partake in races sanctioned by the Jockey Club. She sought a declaration that such practice was against public policy and for injunction. The High Court struck off her statement of claim for want of a cause of action since she cannot succeed unless contractual relationship between herself and the Jockey Club was shown to have existed – there was none, and even if there was – there was no breach.

Leading the crusade to grant her the relief, Denning MR had this to say:

> Now, I quite agree that if we were here considering a social club, it would be necessary for the plaintiff to show a contract. If a man applies to join a social club and is blackballed, he has no cause of action: because the members have made no contract with him. They can do as they like. They can admit or refuse him, as they please; but we are not considering a social club. We are considering an association which exercise virtual monopoly in an important field

> of human activity. By refusing or withdrawing a licence, the stewards can put a man out of business. This is a great power. If it is abused, can the Courts give redress? That is the question. – Page 693.

His answer is found in p. 694:

> When an association, who have the governance of a trade take it upon themselves to license persons to take part in it, then it is at least arguable that they are not at liberty to withdraw a man's licence – and thus put him out of business – without hearing him. Nor can they refuse a man a licence – and thus prevent him from carrying on his business – in their uncontrolled discretion. If they reject him arbitrarily or capriciously, there is ground for thinking that the Courts can intervene.

However the extent of this principle seems to have some reservations 27 years later, in the same Court under the case of *R v. Jockey Club, ex parte Aga Khan* [1993] 2 All ER 853 – where judicial review was refused. The facts of this case were these: Aga Khan, the applicant is the leader of a religious sect. He however was also a racing fan, a breeder and horse owner. He entered his horse 'Aliysa' for a race which won. But on a routine check it was discovered in the urine of this horse – camphor – a prohibited substance under the Rules of Racing. An enquiry was held by the Jockey Club which disqualified the horse and forfeited the winning. The source of camphor was never identified and it was never alleged that the owner or trainer caused or connived at the doping. Dissatisfied, the applicant sought the Court's indulgence in judicial review of the decision of the Jockey Club.

Sir Bingham (MR) (as he was then known) after exhaustively analysing all relevant authorities on this aspect of the law concludes with this at p. 866:

> I have little hesitation in accepting the applicants contention that the Jockey Club effectively regulates a significant national activity, exercising powers which affect the public and are exercised in the interest of the public. I am willing to accept that if the Jockey Club did not regulate this activity the government would probably be driven to create a public body to do so.
>
> But the Jockey Club is not in its origin, its history, its constitution or (least of all) its membership a public body ...
>
> I would accept that those who agree to be bound by the Rules of Racing have no effective alternative to doing so if they want to take part in racing in this country. It also seems likely to me that if, instead of the Rules of Racing administered by the Jockey Club, there were statutory code administered by a public body, the rights and obligations conferred or imposed by the code would probably approximate to those conferred and imposed by the Rules of Racing. But this does not, as it seems to me, alter the fact, however anomalous it may

> be, that the powers of the Jockey Club exercised over those who (like the applicant) agree to be bound by the Rules of Racing derived from the agreement of the parties and give rise to private rights on which effective action for a declaration, an injunction and damages can be based without resort to judicial review. It would in my opinion be contrary to sound and long standing principles to extend the remedy of judicial review for such a case.

A considerable influence on this decision *(R v. Jockey Club, ex parte Aga Khan)* is derived from another Court of Appeal decision of *Law v. National Greyhound Racing Club Ltd.* [1983] 3 All ER 300. The facts in this case were these: The plaintiff was a trainer whose licence had been suspended because he had had charge of a greyhound which had been found on examination prohibited substance in its tissues. He issued an originating summons seeking a declaration that the stewards' decision was void and *ultra vires* because it was reached in breach of an implied duty of fairness and for injunction and damages. The National Greyhound Racing Club (NGRC) moved to strike out the plaintiff's action on ground that it should have sought judicial review. This was rejected and the judgment of Lawton LJ at p. 303 displays the rationale behind it:

> In my judgment, such powers as the steward had to suspend the plaintiff's licence were derived from contract between him and the defendants. This was so for all who took part in greyhound racing in stadium licensed by the defendants. The stewards' enquiry under the 'defendants' rules of racing concern only those who voluntarily submitted themselves to the stewards' jurisdiction. There was no public element in the jurisdiction itself. Its exercise, however, could have consequences from which the public benefited, as for example by stamping out malpractices, and from which the individuals might have their rights restricted by, for example, being prevented from employing a trainer whose licence has been suspended. Consequences affecting the public generally can flow from the decisions of many domestic tribunals. In the past the Courts have always refused to use the orders of *certiorari* to review the decisions of domestic tribunals.

Fox LJ in expressing his concurrent judgment in the same case at p. 305 has this to add:

> Accordingly, in my view, the authority of the stewards to suspend the licence of the plaintiff derives wholly from a contract between him and the defendants. I see nothing to suggest that the defendants have rights and duties relating to members of the public as such. What the defendants do in relation to the control of greyhound racing may affect the public, or a section of it, but the defendants' power in relation to matters with which this case is concerned are contractual.

Despite these two rulings, it is felt at some quarters in recent years, that not all findings flowing from the Jockey Club are not amenable to judicial review. In the case of *R v. Jockey Club, ex parte Massingberd - Mundy* [1993] 2 All ER 207, Neil LJ sitting in the Queen's Bench Division expressed as follows:

> Accordingly, if the matter were free from authority I might have been disposed to conclude that some decisions at any rate of the Jockey Club were capable of being reviewed by the process of judicial review.

Nevertheless, in the circumstances of that case, which facts are: the applicant, a local steward sought judicial review of a decision of the Jockey Club that his name be removed from the list of those who were disqualified to act as chairman of a panel of local stewards – the Court ruled against him on the ground the decision of the Jockey Club was not within the sphere of public law.

Looking at the facts of these cases particularly *ex parte Aga Khan* and *Law*, I entirely subscribe to the views so expressed by the learned Judges of the English Court of Appeal but, in all these situations – there was established contractual relationship between the applicant/plaintiff with the defendants. In *ex parte Aga Khan*, by his agreeing to run 'Aliysa' at the race controlled by the defendants, he accepted on contract to be bound by the defendants' rules. In similar vein, the plaintiff in *Law's* case had a contractual relationship with the defendants by the issuance to him of a trainer's licence by the defendants. Extending this even to *ex parte Massingberd – Mundy* – there was contractual nexus between the steward and the Jockey Club. But what will be the situation when there is no, or yet to be an established contractual relationship, as in the circumstances of our case or that of *Nagle v. Feilden* – where the plaintiff is and was representively not even allowed to enter into any contractual bond with the defendant. Though the plaintiff in our case once held a jockey licence but that licence, like all jockey licences was only valid for a period of one year – for the plaintiff's , it expired in 1990. Thus when the plaintiff made his application for a jockey licence for the year 1996, it is akin to a completely new application. All contractual relationships between the plaintiff and the defendants which once existed (when the plaintiff held the jockey licence in 1990) had ceased; putting the plaintiff on the same footing as a candidate who first applies for such licence, and being refused without reasons attached – would entitle him to the public law remedy of judicial review? Without this remedy he would not succeed in private law since there is no contractual relationship between them.

In my opinion there is no blanket restriction to judicial review of all decisions made by the MRA. There are decisions where circumstances of the case make it amenable to judicial review. These are in respect of those decisions handed

down by MRA where no contractual relationship could be established between the parties, and where the livelihood of the plaintiff is affected particularly in the trade or profession controlled and regulated by the defendant and of which the plaintiff is trained or has chosen to enter. This principle is not without support as Denning MR in *Nagle v. Feilden* (which no subsequent case has revised it) believes:

> at p. 694-B:
>
> We live in days when many trading or professional associations operate "close shops". No person can work at the trade or profession except with their permission. They can deprive him of his livelihood. When a man is wrongly rejected or ousted by one of these associations has he a remedy? I think he may well have, even though he can show no contract. The Courts have power to grant him a declaration that his rejection or ouster was invalid and an injunction requiring the association to rectify their error,
>
> and at p. 694-F:
>
> The true ground of jurisdiction in all these cases is a man's right to work. I have said before, and I repeat it now, that a man's right to work at his trade or profession is just as important to him as perhaps more important than, his property.

In the light of the facts of this case and considering the plaintiff is a trained jockey where his livelihood is towards this nature of work, I find that his application for judicial review of the decision of the MRA is permissible.

The Necessity To Give Reasons

There can be no denial that the letter by MRA to the plaintiff dated 27 February 1996 gave no reason why the plaintiff's application for the jockey licence was rejected. However, subsequently in the affidavit of the secretary of the MRA, the defendants hinted that the licence was not granted in accordance to reg. 37.6 of 'The Malayan Racing Association Calendar 1995' – which is the constitution of the MRA. Under reg. 37.6 there are 11 criteria that must be satisfied before an application for such a licence can be considered. But which one of the criteria the plaintiff failed in satisfying is not disclosed. All in all – no reason has ever been given as to why the plaintiff's application was rejected.

The duty to give reasons by a tribunal is adequately covered in the judgment of *Rohana bte Ariffin & Anor. v. Universiti Sains Malaysia* [1989] 1 MLJ, which was highlighted in the recent Court of Appeal case of *Hong Leong Equipment Sdn. Bhd. v. Liew Fook Chuan* [1996] 1 MLJ 481. I do not intend to analyse this aspect of the law further, except to focus on the present

established and accepted legal principles in this country. Basically, relevance to this case is the rationale of Denning MR in his dissenting judgment in *Breen v. AEU* [1971] 1 All ER 1148 which is:

> If a man seeks a privilege to which he has no particular claim – such as an appointment to some post or other – then he can be turned away without a word. He need not be heard. No explanation need be given: see the cases cited in *Schmidt v. Secretary of State for Home Affairs* [1969] 2 Ch. 149. But if he is a man whose property is at stake, or who is being deprived of his livelihood, then reasons should be given why he is being turned down, and he should be given a chance to be heard; and
>
> if a man has got some right or interest, or some legitimate expectation of which it would not be fair to deprive him without a hearing or reason given; and
>
> The giving of reasons is one of the fundamental of good administration.

As disclosed from the facts of this case, the plaintiff is a trained jockey. In order to earn his living, he has to have a professional jockey licence issued by the MRA. Without it, there is no way he can participate in this profession – thereby depriving him of a livelihood. It is also obvious that before he made his application to the MRA, he would have, or to a substantial degree been aware of the basic criteria as set out under reg. 37.6, or even of the opinion that he has fulfilled them. This is reflected in his letter of application concerning his weight of 46 kg which is well below that of 54 kg set as a ceiling under criteria 10 of reg. 3.7. This set him into the category of those whose deprivation of a livelihood will be affected by the decision of the MRA as well as those who have a legitimate expectation that their application will be considered and when rejected – reason given. By rejecting the plaintiff without reason attached would tantamount to a breach of procedural fairness and natural justice which entitles him to succeed in his first two prayers of his application.

Accordingly, I hereby allow prayer 1 and 2 of encl. 1, and advise the defendants to reconsider the plaintiff's application – and if rejected to give their reason. For this and for the time being, prayer 3 – requesting the defendants to issue the plaintiff with a jockey licence is hereby refused. I am also awarding costs of this application to the plaintiff.

Reported by Michele Saw